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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/825,722

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Tonya Lammers

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SEATTLE, WA 98101-2347

EXAMINER

HWANG, VICTOR KENNY

ART UNIT

PAPER NUMBER

3764

MAIL DATE

DELIVERY MODE

10/17/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/825,722

**Applicant(s)**

LAMMERS, TONYA

**Examiner**

VICTOR K. HWANG

**Art Unit**

3764

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 15 July 2008 and 10 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 5, 7, 8, 28, 32, 34, 35 and 37 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 5, 7, 8, 28, 32, 34, 35 and 37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 16 April 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Continued Examination Under 37 CFR 1.114*

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(c), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(c) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submissions filed on 07/15/2008 and 09/10/2008 have been entered.

### *Response to Arguments*

2. Applicant's arguments filed 07/15/2008 and 09/10/2008 have been fully considered but they are not persuasive.

In response to Applicant's argument that *Hassel* does not disclose a foot cover having first and second layers having relatively higher and lower coefficients of friction, the lamb or sheep skin disclosed by *Hassel* comprises a wool inner layer and a tanned leather outer layer. Each layer inherently has a coefficient of friction relative to a surface, such that the coefficient of friction of the outer leather layer is less than the coefficient of friction of the inner wool layer. Natural wool is known to have a scaly structure that increases its relative coefficient of friction (note the itchiness felt when a person's skin contacts wool), and would have a coefficient of friction that is greater than the coefficient of friction of the leather side relative to a common surface, such as wood or concrete flooring.

In response to applicant's arguments against the references individually (*Richardson*), one cannot show nonobviousness by attacking references individually where the rejections are based

on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to Applicant's argument that *Colman* teaches away from using a material having a fineness rating between about 100 and 200 denier, simply that there are differences between two references is insufficient to establish that such references "teach away" from any combination thereof. *In re Beattie*, 974 F.2d 1309, 1312-13, 24 USPQ2d 1040, 1042 (Fed. Cir. 1992).

*Colman* teaches that the thread diameter is preferably about 250 denier. A thread diameter greater than about 300 denier is considered to lack non-slippage characteristics at an unreasonably unsafe level. Thread diameters significantly less than 250 denier, such as below 200 denier, have strength characteristics considered to be unreasonably low. A thread diameter range between about 200 denier and 300 denier is disclosed as preferable. A thread diameter fineness rating of about 200 denier is considered to fall within the range of about 100 to 200 denier, and is taught by *Colman*. The recitation of "about" provides for a reasonable degree of difference between values.

In response to Applicant's argument that a tether assembly disposed within the flexible cover that defines an area of reduced width of the flexible cover, the flexible cover disclosed by *Hassel* is considered to disclose a tether assembly 17 disposed within the flexible cover. At least one tether 17 passes through openings in the flexible cover and encircles a small portion of the flexible cover. The ends of the tether 17 are tied together at an area of reduced width of the flexible cover (see plan view of Fig. 2). The ends of the tether may be tied such that the flexible cover material bunches up and define a hinge in the flexible cover.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., the tether assembly defining a hinge providing a preferential fold line to aid in folding up the rear portion of the flexible cover behind the ankle) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

### ***Drawings***

3. The drawings were received on July 15, 2008. These drawings are acceptable.
4. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the foot portion including a surface area greater than a surface area of a bottom of the user's foot such that the foot portion may wrap around the foot to cover at least a portion of a top of the foot of the user (claim 28) must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the

drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Specification***

5. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: the specification does not support a foot portion that may wrap around the foot to cover at least a portion of a top of the foot of the user as recited in claim 28; or the specific range recited in claim 34 of the outer layer comprising a material having a fineness rating between "a range of about 100 to 200 denier."

### ***Claim Objections***

6. Claim 1 is objected to because of the following informalities: in line 2, the recitation "an appendage" presumably should be deleted. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 112***

7. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it

pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

8. Claims 28 and 34 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 28 recites the foot portion includes a surface area greater than a surface area of a bottom of the user's foot such that the foot portion may wrap around the foot to cover at least a portion of a top of the foot of the user. Such a feature is not disclosed in the specification as originally filed. The foot portion recited in claim 28, as it depends from claim 1, is distinct from the tongue portion which extends forwardly from the foot portion and is sized and configured to wrap over the front of a user's foot. The foot portion having surface area, other than the tongue portion, to wrap around the foot to cover at least a portion of a top of the foot of the user is considered new matter.

In claim 34, the recitation that the outer layer comprises a material having a fineness rating between "a range of about 100 to 200 denier" is not found in the specification. The specification on page 5, lines 26-28, discloses that the outer layer is made from a fabric having a fineness rating between about 100 denier and about 400 denier, with a preferred fineness rating of 200 denier. The range recited in claim 34 falls within the range disclosed in the specification, but does not recite the specific range limitation of about 100 to 200 denier. Claims 10-12, 17-19, 26 and 27, as originally filed, also recite specific denier ranges of less than about 400 denier, between about 100 denier and about 300 denier, and between 150 denier and about 250 denier,

but do not recite the specific range limitation found in claim 34 of about 100 to 200 denier. The range of about 100 to 200 denier is considered new matter.

***Claim Rejections - 35 USC § 103***

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 1, 28, 32, 35 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Hassel* (US Pat. 1,104,357) in view of. *Hassel* discloses a foot cover comprising a flexible cover for covering a foot, the flexible cover having a foot portion 6 sized and configured to underlie a user's foot and a tongue portion 10 extending forwardly from the foot portion and sized and configured to wrap over the front of a user's foot. The flexible cover includes an inner layer 15 positioned to engage the user's foot. The inner layer 15 is preferably of wool and may be any suitable lining providing warmth and comfort. The flexible covering may comprise lamb or sheep skin with the wool as the inner surface 15 and the leather skin as the outer surface layer being dressed or tanned in any preferred way. The foot portion 6 may be considered to include a surface area greater than a surface area of a bottom of a user's foot such that the foot portion 7 may wrap around the foot to cover at least a portion of a top of the foot of the user.

The flexible cover may be further provided with a tether assembly 17 disposed within the flexible cover. At least one tether 17 passes through openings in the flexible cover and encircles a small portion of the flexible cover. The ends of the tether 17 are tied together at an area of



reduced width of the flexible cover (see plan view of Fig. 2). The ends of the tether may be tied such that the flexible cover material bunches up and define a hinge in the flexible cover. Additional laces 16 provide an attachment assembly configured to secure the flexible cover about the user's foot.

*Hassel* does not disclose the inner layer having a coefficient of friction relative to a surface and the outer layer having a second coefficient of friction relative to the surface, the second coefficient of friction lower than the first coefficient of friction (claims 1 and 35).

The wool layer and the leather layer each inherently have coefficients of friction relative to a surface, such that the coefficient of friction of the outer leather layer is less than the coefficient of friction of the inner wool layer. Natural wool is known to have a scaly structure that increases its relative coefficient of friction, and would have a coefficient of friction that is greater than the coefficient of friction of the leather side relative a common surface, such as wood or concrete flooring.

It would have been obvious to one having ordinary skill in the art at the time the invention was made that the coefficient of friction of the wool inner layer of *Hassel* is greater than the coefficient of friction of the outer leather layer of *Hassel* relative to a surface such as wood or concrete flooring material, since each material inherently has a coefficient of friction relative to a second material and natural wool is known to have a scaly structure that provides it with a relatively higher coefficient of friction.

11. Claims 5 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Hassel* (US Pat. 1,104,357) as applied to claim 1 above, and further in view of *Colman* (US Pat.

3,084,459). *Hassel* has been discussed above, and such discussion is incorporated herein.

*Hassel* discloses the invention as claimed except for the outer layer formed from nylon (claim 5), or the outer layer comprising a material having a fineness rating between a range of about 100 to 200 denier (claim 34).

*Colman* discloses a foot cover comprising an outer layer that may comprise nylon material, such as Dacron. *Colman* teaches that the thread diameter is preferably about 250 denier. A thread diameter greater than about 300 denier is considered to lack non-slippage characteristics at an unreasonably unsafe level. Thread diameters significantly less than 250 denier, such as below 200 denier, have strength characteristics considered to be unreasonably low. A thread diameter range between about 200 denier and 300 denier is disclosed as preferable. A thread diameter fineness rating of about 200 denier is considered to fall within the range of about 100 to 200 denier.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the outer layer of *Hassel* as a nylon material of about 200 denier, since *Colman* discloses that it is known to provide the outer layer of a foot covering with Dacron material and since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

12. Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over *Hassel* (US Pat. 1,104,357) as applied to claim 1 above, and further in view of *Zimmon* (US Pat. 3,106,790). *Hassel* has been discussed above, and such discussion is incorporated herein. *Hassel* discloses

the invention as claimed except for the attachment assembly comprising a plurality of straps configured to secure the flexible cover to the foot of the user. *Hassel* discloses a single lace 16 configured to secure the flexible cover to the foot of the user.

*Zimmon* discloses a foot cover comprising a plurality of straps 16,17 configured to secure a flexible cover 11 to the foot of a user. Straps 16,17 comprise Velcro fastening elements, well known in the art as hook and loop type releasable fasteners. *Zimmon* also discloses a tether assembly 38 to bunch up the flexible cover and define an area of reduced width.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the flexible cover of *Hassel* with the plurality of Velcro straps of *Zimmon* to secure the flexible cover to the foot of the user, since Velcro straps are well known in the art for providing a releasable means for securement.

13. Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over *Hassel* (US Pat. 1,104,357) as applied to claim 1 above, and further in view of *Richardson* (US Pat. 6,044,497). *Hassel* has been discussed above, and such discussion is incorporated herein. *Hassel* discloses the invention as claimed except for the inner layer formed from neoprene rubber. *Hassel* discloses that the inner surface layer may comprise wool or any suitable lining that provides warmth and comfort (page 2, lines 48-52).

*Richardson* discloses that neoprene rubber material provides warmth and cushioning for a user's feet. The material traps heat, is flexible and does not slip off a user's foot during use. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the foot cover of *Hassel* with a neoprene rubber inner layer, since *Richardson*

discloses that neoprene rubber is a material used in footwear to provide warmth and comfort, and thus would be an equivalent substitute for wool material and since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

***Conclusion***

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to VICTOR K. HWANG whose telephone number is (571) 272-4976. The examiner can normally be reached on M-F 7:30-4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, LoAn H. Thanh can be reached on (571) 272-4966. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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